IN THE SUPREME COURT OF THE UNITED STATES

CASE NUMBER: 78-6385

OCTOBER TERM, 1979

RECEIVED
JUN 21 1979
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SUPREME COURT, U.S.

FLYNN NOYE HICKS # 94947

Petitioner Pro Se

versus

THE STATE OF OKLAHOMA

Respondent

PETITION FOR WRIT OF CERTIORARI

Certiorari To Review The Final Judgment, Dated April 6, 1979, Case Number F-77-751, Of The Court Of Criminal Appeals Of The State Of Oklahoma

---

Petitioner Pro Se
Flynn Noye Hicks, #94947
Oklahoma State Penitentiary
Post Office Box 97
McAlester, Oklahoma, 74501

INDEX OF SUBJECT - MATTER — Page Number

NATURE OF THIS PROCEEDING 1
THE OPINION BELOW 1
JURISDICTIONAL STATEMENT 1
QUESTIONS OF LAW PRESENTED FOR REVIEW 2
FEDERAL CONSTITUTIONAL INVOLVED 3
14th AMENDMENT 3
OKLAHOMA STATUTE INVOLVED 3
TITLE 21 OKLAHOMA STATUTE SUPPLEMENT (1977) SECTION 51(B) 3
STATMENT OF FACTS 4
STATEMENT OF THE CASE 3
ARGUMENT 6
EXCERPT FROM THE OPINION BELOW 7
TRIAL COURT'S INSTRUCTION #4 7
PROSECUTOR EXPLOITED INSTRUCTION #4
IN HIS CLOSING-ARGUMENT 8
PRAYER FOR RELIEF 10
CONCLUSION 11
VERIFICATION 11
PROOF OF SERVICE 11

TABLE OF CASES

BORDENKIRCHER V. HAYES, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 ... 9
CARMONA V. WARD, 439 U.S. ___, 99 S.Ct. 874, 58 L.Ed.2d 9
COKER V. GEORGIA, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 9
CORBITT V. NEW JERSEY, 439 U.S. ____, 99 S.Ct. 492, 58 L.Ed.2d ___ ... 9
GARDNER V. GEORGIA, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 9
LEE V. STATE, Okl. Cr., 572 P.2d 260 9
PRESNELL V. GEORGIA, 439 U.S. ___, 99 S.Ct. 235, 58 L.Ed.2d ___ 9
THIGPEN V. STATE, Okl. Cr., 571 P.2d 467 8
UNITED STATES V. JANKSON, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138. 9
WOODSON V. NORTH CAROLINA, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944.. 9

IN THE SUPREME COURT OF THE UNITED STATES

JUN 21 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

FLYNN NOYE HICKS, #94947)
Petitioner Pro Se)
)
versus) CASE NUMBER: _____
)
THE STATE OF OKLAHOMA)
Respondent)
_____)

PETITION FOR WRIT OF CERTIORARI

NATURE OF THIS PROCEEDING

I

This is a Petition For Writ Of Certiorari By Flynn Noye Hicks, #94947, a State Prisoner, who is serving a term of Forty (40) years for unlawful Distribu-tion of a Controlled Dangerous Substance, After Former Conviction Of Felony. The said Forty (40) year sentence is being served in the Oklahoma State Penitent-iary, Post Office Box 97, McAlester, Oklahoma, 74501.

II
THE OPINION BELOW

The Opinion Below dated March 8, 1979, is an unpublished Order Of the Oklahoma Court Of Criminal Appeals, Case Number P-77 751, affirming the final Judgment in Case No. CRF 76-4597 of the District Court Of Oklahoma County, Oklahoma. On March 23, 1979 a Petition For Rehearing was filed and, subsequently, on April 6, 1979 the said Petition For Rehearing was denied. Xerox Copy of the Order Affirming the Petitioner's Direct Appeal in Case No. F-77-751 is attached herewith as Petitioner's Exhibit #1 and a xerox copy of the Order Denying the Petition For Rehearing is attached herewith as Petitioner's Exhibit #2.

III
JURISDICTIONAL STATEMENT

The statement of the grounds on which the Jurisdiction of this court is invoked is as follows. The Petitioner Flynn Noye Hicks alleges that he is being

deprived of his LIBERTY in violation of the Due Process Cluase of the 14th Amendment. Specifically, the Petitioner alleges that, among other things, the trial c court gave an instruction based upon an invalid Oklahoma Statute (Title 21 O.S. Section 51(b)). The trial court instructed the jury that there was only one mandatory sentence which was Forty (40) years. Under the Oklahoma Statute involved, Title 21 O.S. Section 51(b), the sole sentence to be imposed was a "Mandatory Term of Forty (40) years." Thus, the jury was compelled under the trial court's instructions to imposed a mandatory Forty (40) yeer Term. The Petitioner alleges, because the said Oklahoma Statute Title 21 O.S. Section 51(b) was subsequently declared null and void, that (1) the trial court's instructions denied him due process of law, (2) the verdict of the jury denied him due process of law, and (3) the manner in which the Forty (40) year sentence was imposed denied him due process of law as the same is provieded by the Due Process Clause of the 14th Amendment.

Also, under the facts and circumstances of this instant case the Petitioner was denied the Equal Protection of the laws by the action of the trial court and by the action of the Oklahoma Court Of Criminal Appeals.

The date of the final Judgment #F-77-751 is March 8, 1979 and the date of the order denying rehearing is April 6, 1979. No extension of time has been sought becuase there is no need for an extension of time.

Since the Oklahoma Court Of Criminal Appeals is the highest State Court: it is believed by the Petitioner that this court has Jurisdiction under Title 28 U.S.C. Section 1257.

IV
QUESTIONS OF LAW PRESENTED FOR REVIEW

#1 ..... The first question presented is whether, under the facts and circumstances involved in this instant case, the mandatory Forty (40) year Sentence was imposed in a manner that violates the following provisions of the 14th Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of * * , LIBERTY, or * * without due process of law"?

#2 ..... The second question presented is (1) whether the action of the trial court and (2) whether the action of the Oklahoma Court of Criminal Appeals denied the petitioner the Equal Protection of the laws since the said Oklahoma Statute Title 21 O.S. Section 51(b) was declared null and void on October 14, 1977 in THIGPEN V. STATE, Okl. Cr., 571 P.2d 467 as a matter of Constitutional law?

V
FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED
14th AMENDMENT, UNITED STATES CONSTITUTION

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the Unitedd States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, LIBERTY, or propetty without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OKLAHOMA STATUTE INVOLVED
Title 21 Oklahoma Statutes Supp. (1977) Section 51 (b)

"Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense; provided, that felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time or location; of events closely related in time or location; provided, further, that nothing in this section shall abrogate or affect the punishment by death in all crimes now or hereafter made punishable by death.

VI
STATEMENT OF FACTS
and
STATEMENT OF THE CASE

The conviction here resulted from a Jury Trial on April 21, 1977 in Case no. CRF-76-4597 from the District Court Of Oklahoma County, Oklahoma, before the Hon, Charles Owens, District Judge.

The petitioner, Flynn Noye Hicks, (hereafter referred to as defendant) and Diane Elisabeth Jones were charged by the State Of Oklaahoma with the offense of Unlawful Distribution of a Controlled Dangerous Substance in violation of 63 O.S. Supp. 1976 § 2-401. The defendant Hicks, for whom this certiorari petition is lodged, received a sentence of forty years in the State Penitentiary after

his conviction in Oklahoma County on April 21, 1977.

STATEMENT OF FACTS

In the initial phase of the trial, the State called three witnesses: Eugene Major, Malcom J. Atwood, and Dennis Goodpasture. The defendant called Brent Barnes; who was not allowed to testify.

Mr. Major, who is employed by an Oklahoma Multi-County Intelligence Agency, testified that on October 5, 1976, he met with Agents Beshearer and Atwood at a local motel to determine whether he would conduct an investigation that day. Following their discussions, he picked up a confidential informant in northeast Oklahoma City. He testified that he went to Tate's Grocery Store and parked his car on the North Side of the street. He further testified that he was approached by a black male, identified as the defendant, who engaged in conversation with him. The witness stated that he told the defendant that he had "not scored". According to the witness, defendant stated that he might help him get some and requested that the witness remove his car. After this conversation, the defenant left. Mr. Major also left when the confidential informant came and asked to be taken to a phone booth. When Major returned, he reported seeing a car parked two blocks away whichwas occupied by two females. Major testified that the defnedant went to the car, came back and indicated that something was available. The defendant then allegedly had a balloon in his hand which he sold to Major for $25. Major further testified that he purchased a second balloon from the co-defendant Diane Jones.

On cross-examination, the witness admitted that he had no plan for investigation, but only went out "cold" that day. He further testified that he and the defendant did go to a house three or four blocks away; and that he did not know whose house it was. He said that the confidential informant remained on 23rd street when he and defendant went to the house. Upon questioning by the defense attorney, Major admitted that he had testified before Judge Dudley in preliminary hearing on the 11th of January, 1977, on this matter. When asked about inconsistencies concerning the confidential informant and evidence, he stated that he thought it was a mistake of the court reporter.

The State next called Agent Malcolm John Atwood. Under direct examination he stated that he worked for the Bureau of Narcotics and Dangerous Drugs of Oklahoma. He further testified that he met with officer Major on the Day in question, but that Major left to pick up a confidential informant. He followed Major but quickly lost track of him. It was not until about 40 minutes later that he saw Major at the motel. There, he tested the balloons given to him by Agent Major utilizing a field test and obtained positive results.

During cross-examination, the witness admitted that he lost sight of Agent Major and that he did not see anyone in the car with him, althought he expected the x informant to be there. He also testified that he could not see the transaction described by witness Major.

Dennis Goodpasture, a chemist with the Oklahoma State Bureau of Investigation stated that he tested the contents of the envelopes. He further stated that the contents contained heroin.

Over objection by the defendant, the Court permitted the State to recall Agent Major. The witness testified that his initials were on the evidence envelope along with the date. He again testified tht the evidence was received from the defendant.

On cross-examination the attorney for the defendant elicited the admission from the witness that he talked to the Prosecutor, Agents Beshearer and Atwood before returning to the witness stand.

The State was also permitted, over objection, to recall Malcom Atwood. He was questioned concerning the identity of the co-defendant and the evidence envelopes.

The defense called Brent Barnes, who testified that he is a Certified Shorthand Reporter who worked for Judge Dudley, on January 11, 1977, during the preliminary hearing for the defendant. When the defense attempted to ask him questions concerning the transcript, the State objected on the grounds that the transcript had not been filed. The witness testified that he took the transcript to the Clerk's office and turned it in, and to the best of his knowledge, it was filed. After a hearing in chambers, the Court decided to sustain the State's motion and not allow the witness to testify.

The defense called no other witnesses and then rested.

The question of law was raised on Direct Appeal, see Petitioner's Exhibit #1, page #2, and the question was raised again the the Petition For Rehearing. The Oklahoma Court Of Criminal Appeals said, see Petitioner's Exhibit #1, page #2, line #27:

Hon. Hez Bussey ..... "Defendant asserts in his 4th assignment of Error that
Judge Title 21 O.S. Supp. (1977) Section 51(b), under which he was sentenced is unconstitutional. We agree. This question was laid to rest by this Court in Thigpen v. State, Okl. Cr., 571 P.2d 467. We must find however, that the defendant was not prejudiced by the use of this Statute in that sentence imposed is within the range of punishment authorized by the provisions of Title 21 O.S. Supp. (1977) Section 51(a)."

In compliance with Rule #23(1)(F) (of the Rules of this court) the manner in which the lower-court ruled on the question presented is shown above. Thus, the stage of the proceedings where the Question Presented was raised for the first time is shown above, also, the manner in which the court ruled on the Question Presented is shown.

The Petition For Rehearing was denied on April 6, 1979 and from this Order (since it is the finally Judgment of the State Court) the petitioner seeks to have this Final Judgment reviewed by a Petition For Writ Of Certiorari.

VII
ARGUMENT

#1..... When the sentence of Forty (40) years was imposed, the Procedure employed by the trial court denied the defendant Flynn Noye Hicks due process of law.

#2..... The Trial Court's instructions to the jury that a sentence of Forty(40) years was mandatory denied the defendant both due process of law and the equal protection of the laws.

#3..... Under the facts and circumstances of this case; the mandatory sentence here of Forty(40) years violates both the 8th and 14th Amendments.

In support of his argument, the petitioner points out an Excerpt From The Opinion Below of the Oklahoma Court Of Criminal Appeals #F-77-[illegible]
See Petitioner's Exhibit #1, page #2, line #27.

Hon. Hez Bussey..... "Defendant asserts in his 4th Assignment of Error that
Judge Title 21 O.S. Supp. (1977) Section 51(b), under which he was sentenced is unconstitutional. We agree. This question was laid to rest by this court in Thigpen v. State, Okl. Cr., 571 P.2d 467. We must find, however, that the defendant was not prejudiced by the use of this Statute, in that, the sentence imposed is .. within the range of punishment authorized by the provisions of Title 21 O.S. Supp.(1977) Section 51(b)."

As shown after admitting that the defendant was sentenced under Section 51(B) of of Title 21 Hon Hez Bussey affirmed the punishment under Section 51(a) even thought the defendant was tried under Section 51(B). The petitioner urges that an error committed Section 51(b) can not be justified by the language under Section 51(A), for, the petitioner was tried, convicted, and sentenced under Section 51(B).

The trial court read the Instructions to the jury (see Tr. 171). In so doing, the trial court instructed the jury that a sentence of Forty(40) years was "Mandatory". The said Instruction is out below.

See..... "Instruction #4 .....

Hon. Charles Owens.... "You are instructed that as to the defendant Flynn Noye
Trial Court Hicks the law provides that every person, who, having been twice convicted of a Felony offenses, commits a third, or thereafter, felony offense within ten (10) years of date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of Twenty(20) years plus the longest imprisonment for which the said third, or subsequent term was punishable, had it been a first offense. Under thefacts of this case this means that should you find that this defendant has been twice convicted of felony offenses and that he committed the present offense . within ten (10) years of the completion of both the previous offenses, then you shall assess his punishment at Forty(40) years imprisonment in the State Penitentiary."

/s/ Hon. Charles Owens, District Judge
Dated April 12th, 13th and 14th, 1977

In his Closing Argument the prosecutor explited the above Instruction #4

in the following way and manner: see Transcript #CRF 76 4597, page #172, line #14...

PROSECUTOR....."Its mandatory the legislature said, as your Honor read to you in the Instruction. And the Judge sets the law out, I don't and the other attorney don't. It is mandatory that they get Forty (40) years if you find that he has been convicted of two (2) felonies before."

* * * * * * * * * * *

(continue on page #173, line #17) ....

PROSECUTOR....." * * * , and a term of Forty (40) years as set out in the Statutes as mandatory by the State Legislature."

(continue on page #179, line #18)....

PROSECUTOR..... ** * * * *. The court's Instruction were that under number Four, you may like to read this:

'Under the facts of this case this means that , should you find that this defendant has been twice convicted of felony offenses and that he committed the present offense within ten (10) years of the completion of both of the previous offenses, then you shall assess his punishment at Forty (40) years imprisonment in the State Penitentiary.'

Fourty (40) years. I don't see how he can tell you to ignore the two previous felony convictions. You have heard the testimony. He even stipulated."

(continue on page #180, line #13)

* * * * * * * *

PROSECUTOR.....** * * *. The law says that xx two previous convictions, then is shall be Forty (40) years."

The Oklahoma Legislature did enact the "Mandatory" sentence Statute; see Title 21 O.S. Supp. (1977) Section 51(B). However, on October 14, 1977 the Oklahoma Court Of Criminal Appeals struck down Section 51(B) as being unconstitutional: see Thigpen v. State, Okl. Cr., 571 P.2d 467. Thus, when the trial court here read Instruction #4 to the jury a constitutional error was committed and, when the prosecutor exploited the constitutional error by commenting upon the said Instruction #4, the error compounded.

Also, when the Oklahoma Court Of Criminal Appeals refused to correct the error....the said error again compounded.

It is believed by the petitioner that the error violated the following provisions of the Federal Constitution.

See.....14th Amendment, United States Constitution

* * * * * . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall ny State deprive any person of life, LIBERTY, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

If the Petitioner Flynn Noye Hicks is correct that the error did violate the above provisions of the 14th Amendment, in that event, the said mandatory sentence of Forty (40) years is void.

Under different facts and circumstances this court recently struck down "Mandatory Santences" in the following cases.

See....WOODSON V. NORTH CAROLINA, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944

or see ... COKER V. GEORGIA, 439 U.S. 584, 97 S.Ct. 2861, 53L.Ed.2d 982

However, on January 8, 1979, this court refused to strike down the New York mandatory life sentence for certain drug convictions.

See.... CARMONA V. WARD, 439 U.S. ____, 99 S.Ct. 874, 58 L.Ed.2d ____, No. 78-5531...

The defference between this instant case and Carmona v. Ward, supra is that here the highest State Appellate court has already struck down the statute involved.

Thus, the issue here is whether the PROCEDURE (employed by the trial court to obtain the Forty (40) year mandatory sentence) violated the Due Process Caluse and violated the Equal Protection Clause. To be sure, the Petitioner Flynn Noye Hicks urges that here the PROCEDURE itself violated his Federal Constitutional right to Due Process of Law and also violated his right to the Equal Protection of the laws. In support of this argument

See.....LEE V. STATE, Okl. Cr., 572 P.2d 260 where relief was granted under Thigpen v. State, Okl. Cr., 571 P.2d 467. The Petitioner Flynn Noye Hicks is entitled to similar relief here. In Oklahoma the Thigpen-Case supra is a precedent entitled to binding weight...yet, the court did not afford the Petitioner here the relief that was afforded to all other persons similarly situated.

The Petitioner Flynn Noye Hicks is entitled to a new sentencing trial, or a new penalty stage, under the cases that have been handed down by this court: see UNITED STATES V. JACKSON, 390 U.S. 570, 88 S.Ct. 1209, 20L.Ed.2d 138. In contrast to the facts here, there are other cases where mandatory sentences were imposed and each case is distinguishable from the facts here. See for example BORDENKIRCHER V. HAYES, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 and CORBITT V. NEW JERSEY, 439, U.S. ____, 99 S.Ct. 492, 58 L.Ed.2d ____, or see GARDNER V. FLORIDA, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 and, last, wee HRESNELL V.

V. GEORGIA, 439 U.S. ____, 99 S.Ct. 235, 58 L.Ed.2d ___. The above cases are instructive for the following reasons. Here, the "Mandatory" sentence Forty (40) years was imposed as a result of an unconstitutional Statute. This single factor distinguishes the FACTS here form many of the above cases.

The failure of that trial court and the failure of the Oklahoma Court Of Criminal Appeals to grant relief denied the Petitioner Flynn Noye Hicks the equal protection of the laws since relief was granted in both Thigpen v. State, Okl. Cr., 571 P.2d 467 and Lee v. State, Okl. Cr., 572 P.2d 260. In Oklahoma all other persons similarly situated were granted relief, see Lee v. State, Okl. Cr., 572 P.2d 260.

A sentence violates the 8th and 14th Amendments if much a sentence can be classified as follows:

> "A punishment is excessive and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out proportion to the severity of the crime."
> cited from COKER V. GEORGIA, 433 U.S. at 592, 97 S.Ct. at 2861, 53 L.Ed.2d 982, and from CARMONA V. WARD, 439 U.S. at ____, 99 S.Ct. at 877, 58 L.Ed.2d _____.

For all of these reason this court is asked to grant certiorari and to thereafter grant the relief prayed for in the Petitioner's Prayer For Relief.

VIII
PRAYER FOR RELIEF

The Petitioner Flynn Noye Hicks prays that this court will (1) grant a Writ Of Certiorari to review the final Judgment #F-77-751 of the Oklahoma Court Of Criminal Appeals, (2) appoint an attorney to represent the petitioner in this Court, (3) hold Oral Arguments, and (4) vacate final Judgment #F-77-751 of the State Court with instructions vacate the Petitioner's Forty (40) years and thereafter allow to allow the petitioner an opportunity to be heard at a new penalty trial prior to the imposition of any new sentence.

IX
CONCLUSION

WHEREFORE the petitioner prays that the court will grant relief as set out in the Petitioner's Prayer For Relief. It is so Prayed.

Respectfully submitted

Flynn Noye Hicks #94947
Oklahoma State Penitentiary
Post Office Box 97
McAlester, Oklahoma 74501

X
VERIFICATION

STATE OF OKLAHOMA)
) ss:
COUNTY OF PITTSBURG)

Flynn Noye Hicks, after being first sworn under oath, affirms that the above Petition For Writ Of Certiorari is true and correct to the best his knowledge, belief, and memory.

Flynn Noye Hicks
Affiant, Flynn Noye Hicks

Subscribed and sworn to before me
this 18th day of June, 1979.
D. Martin
Notary Public
My Commission expires: 1-25-83

XI
PROOF OF SERVICE

On June ____, 1979 I mailed a copy of the above instrument to attorney General of Oklahoma, Jan Eric Cartwright, 112 State Capitol Building, Oklahoma City, Oklahoma, 73105.

Flynn Noye Hicks
Petitioner Pro Se

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 8 1979
Ross N. Lillard, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FLYNN NOYE HICKS,)
Appellant,)
-vs-)
THE STATE OF OKLAHOMA,)
Appellee.)

NOT FOR PUBLICATION

No. F-77-751

AUTHORIZED FOR FILING
MAR 8 1979
COURT OF CRIMINAL APPEALS

- O P I N I O N -

BUSSEY, Judge:

Appellant, Flynn Noye Hicks, hereinafter referred to as defendant, was convicted in the District Court, Oklahoma County, Case No. CRF-76-4597, of Unlawful Distribution of a Controlled Dangerous Substance, in violation of 63 O.S.Supp.1976, § 2-401, After Former Conviction of Felonies to wit: Burglary in the Second Degree and Assault and Battery With a Dangerous Weapon With Intent to do Bodily Harm. At the trial the State proved that Eugene Major, of the Multi-County Intelligence Agency, purchased a balloon of heroin from the defendant, and another from Dianne Jones, a codefendant on October 5, 1977.

Defendant asserts in his first assignment of error that the trial court erred in not permitting him to impeach the testimony of Agent Major by the use of a prior inconsistent statement. At the trial Major testified that prior to meeting the defendant he picked up a confidential informant. The defendant wished to call as a witness the court reporter from the preliminary examination, to testify that Major had said at that time that there was no informer. But at the trial Major also testified that he let the informer out of the car before he met the defendant, and that the informer was not present during any of the transaction.

In Oklahoma a witness may not be impeached by the use of inconsistent statements as to collateral matters. Tarter v. State, Okl.Cr., 350 P.2d 596 (1961). Since the informant in the instant case was not present at the time Major bought the heroin, the issue of his existence was a collateral matter. Therefore the trial court's ruling was correct, and this assignment of error is without merit.

Defendant contends in his second assignment of error that the trial court erred by refusing to permit the court reporter to verify the accuracy of the transcript. We agree with the defendant's contention that a court reporter may be called to verify a transcript prepared by him. See Lewis v. State, Okl.Cr., 458 P.2d 309 (1969). We must find the error to be harmless, however, since we have found that its intended use to impeach the witness Major as to a collateral matter would have been improper.

Defendant urges in the third assignment of error that the trial court erred in invoking the rule of sequestration and then allowing the State to recall witnesses Major and Atwood. We have consistently held that it is within the discretion of the trial court to allow or exclude the testimony of a witness who has violated such rule. See Kilgore v. State, 10 Okl.Cr. 446, 137 P. 364 (1914) and Slaughter v. State, Okl.Cr., 236 P.2d 993 (1951). Absent a more definitive showing by defendant demonstrating an abuse by the trial court of its discretion in permitting the witnesses to testify, we must find this assignment of error to be without merit.

Defendant asserts in his fourth assignment of error that 21 O.S.Supp.1977, § 51(B), under which he was sentenced, is unconstitutional. We agree. This question was laid to rest by this Court in Thigpen v. State, Okl.Cr., 571 P.2d 467 (1977). We must find however, that the defendant was not prejudiced by the use of this statute in that the sentence imposed is within the

range of punishment authorized by the provisions of 21 O.S.Supp. 1977, § 51(A).

Defendant next contends that he did not receive a fair trial because of the improper remarks of the prosecuting attorney. We have carefully examined each of the alleged improper remarks and observe that on only one occasion did defendant object to the remarks. In that instance, the defendant failed to request that the jury be instructed to disregard the remark. We have repeatedly held that when an objectional statement is made by the prosecution, it should be called to the attention of the court by timely objection, together with a request that the jury be instructed to disregard the improper statement and in the event that the objection is overruled, an exception should be taken to the ruling of the Court, preserved and argued in the motion for new trial. When this is not done, the defendant is deemed to have waived any objection unless the remarks are so fundamentally prejudicial that the court cannot by instructions to the jury correct such error. See Neal v. State, Okl.Cr., 506 P.2d 936 (1976) and Kern v. State, Okl.Cr., 522 P.2d 644 (1974). Finding that the remarks were not so fundamentally prejudicial that they could not have been cured by instruction to the jury, we are of the opinion that this assignment of error is without merit.

Defendant finally contends that the accumulation of errors were so prejudicial as to justify reversal. Inasmuch as we have found defendant's preceding assignments of error to be without merit, it necessarily follows that this assignment of error is also without merit.

The judgment and sentence is accordingly AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT, OKLAHOMA COUNTY, OKLAHOMA,
HONORABLE CHARLES L. OWENS, JUDGE,

FLYNN NOYE HICKS, appellant, was charged and convicted for the offense of Unlawful Distribution of a Controlled Dangerous Substance;

was sentenced to forty (40) years' imprisonment, and appeals. Judgment and sentence AFFIRMED.

JOHN T. ELLIOTT,
PUBLIC DEFENDER OF OKLAHOMA COUNTY,
DAVID W. LEE, ASST. PUB. DEFENDER,
JANE F. WHEELER,
Attorney for Appellant,

LARRY DERRYBERRY, ATTORNEY GENERAL,
JOE H. ENOS, ASST. ATTY GEN.,
Attorneys for Appellee.

OPINION BY BUSSEY, J.
CORNISH, P. J. AND BRETT, J. CONCUR.

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR 6 1979
Ross N. Lillard, Jr.
CLERK

FLYNN NOYE HICKS,)
Appellant,)
-vs-) No. F-77-751
THE STATE OF OKLAHOMA,)
Appellee.)

ORDER DENYING PETITION FOR REHEARING
AND ISSUANCE OF MANDATE FORTHWITH

On the 23rd day of March, 1979, a Petition for Rehearing was filed in case number F-77-751. After thorough consideration of the issues raised and the authorities cited, we are of the opinion that the Petition for Rehearing should be denied.

IT IS THE FURTHER ORDER of this Court, that the Mandate issue FORTHWITH.

IT IS SO ORDERED.

WITNESS OUR HANDS, and the Seal of this Court, this 6th day of April, 1979.

TOM R. CORNISH, PRESIDING JUDGE

TOM BRETT, JUDGE

HEZ J. BUSSEY, JUDGE

ATTEST:

CLERK

IN THE SUPREME COURT OF THE UNITED STATES

RECEIVED
JUN 21 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

OCTOBER TERM, 1979

CASE NUMBER 78-6885

FLYNN NOYE HICKS #94947
PETITIONER PRO SE

-VS-

THE STATE OF OKLAHOMA
RESPONDENT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Comes now the petitioner Flynn Noye Hicks and states that he is a poor person unable to pay the filing fees and other costs, and that he is without friends, or relatives, willing or ablt to pa y such costs for him. And that, unless the court grants him leave to proceed as a poor person under Title 28 U.S.C. Section 1915, he will be unable to proceed. In support the petitioner has attached his affidavit of poverty.

Respectfully Submitted,

Flynn Noye Hicks #94947
Oklahoma State Penitentiary
Post office Box 97
McAlester, Oklahoma, 74501

78-6883

AFFIDAVIT OF POVERTY

RECEIVED
JUN 21 1979
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SUPREME COURT, U.S.

STATE OF OKLAHOMA)
COUNTY OF PITTSBURG) ss

Flynn Noye Hicks, after being first sworn under oath, deposes and states that:

1)..... The Petition for Writ of Certiorari is litigated in good faith, for, the petitioner truly believes that he is entitled to the relief requested in the petition.

2)..... The petitioner is without sufficient funds to prepay the filing fees and other costs and, unless the court grants leave to proceed as a poor person, the petitioner will not be able to proceed.

3)..... The nature of the grounds is as follows:

SUB'D...(a)... During the course of the petitioner's jury trial the trial court instructed the jury that a sentence of Forty (40) years was "Mandatory". Because of Oklahoma statute that is involved here was subsequently declared null and void as a matter of constitutional law; the petitioner Flynn Noye Hicks alleges that he was denied due process of law by the Instruction that a sentence of forty (40) years was mandatory.

The petitioner affirms that the above affidavit of poverty is true and correct to the best of my knowledge, belief and memory.

Affiant Flynn Noye Hicks #94947
Oklahoma State Penitentiary
Post Office Box 97
McAlester, Oklahoma, 74501

Subscribed and sworn to before me this 18 day of June, 1979.

Notary Public A. Martin

My Commission Expires: 1-25-83

PROOF OF SERVICE

On June_____, 1979, I mailed a copy of the above instrument to Jan Eric Cartwright, Attorney General of Oklahoma, 112 State Capitol Building, Oklahoma City, Oklahoma, 73105

Flynn Noye Hicks
Petitioner Pro Se